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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 70-286

IOWA BEEF PACKERS, INC., *Petitioner,*

v.

EDWARD D. THOMPSON, *et al., Respondents.*

On Writ of Certiorari to the Supreme Court of Iowa

BRIEF FOR THE PETITIONER

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On Writ of Certiorari to the Supreme Court of Iowa

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The trial court's ruling, denying petitioner's Motion for Separate Adjudication of Law Points (that is, to dismiss for respondents' failure to invoke the grievance procedures of the collective bargaining agreement), on March 5, 1968 is printed in the single Appendix, A.7.

The Final Judgment and Decree by the trial court, filed October 20, 1969 is printed in the Appendix, A.9. The Opinions of the Supreme Court of Iowa, filed April 9, 1971 are reported at 185 N.W. 2d 738 and are printed in the Appendix, A.13 and A.20.

JURISDICTION

The Opinions (majority and dissenting) of the Supreme Court of Iowa are dated and were entered on April 9, 1971. The Clerk of that Court informs counsel for petitioner that entry of Judgment in that Court must be deferred as there is on file the Stay Order dated April 29, 1971; the full text of that Order is printed in Appendix, A.12. The statutory provision believed to confer on this court jurisdiction to review that judgment by writ of certiorari is 28 U.S.C. 1257 (3); and counsel believes the applicable rule of this Court is Rule 19 (1) (a). Petition for writ of certiorari was filed June 16, 1971 and granted October 12, 1971.

STATUTES

Labor Management Relations Act, 1947 (LMRA) Section 203 (d), 61 Stat. 153, Section 301 (a) 61 Stat. 156, 29 U.S.C. Section 173 (d) and 185 (a) (printed as Supplement A at the end of this brief).

United States Arbitration Act, originally enacted by Act of February 12, 1925, c. 213, 1-15, 43 Stat. 883-886, codified in 1947 into Title 9, U.S.C., now 9 U.S.C. Section 3 (printed as Supplement B at the end of this brief).

Fair Labor Standards Act (FLSA), Act of 1938 as amended, now 29 U.S.C. 201-219, Section 16 (b) (printed as Supplement C at the end of this brief).

QUESTIONS PRESENTED

1. Whether, in the circumstances of this case, the prevailing opinion in the Supreme Court of Iowa erroneously read or erroneously applied the rule of the prevailing opinion in *U.S. Bulk Carriers, Inc.* v. *Arguelles,* 400 U.S. 351, 27 L. Ed. 2d 456, 91 S. Ct. 409 (January 13, 1971); and whether it should have applied *Republic Steel Corporation* v. *Maddox,* (1965), 379 U.S. 650.

2. Is an employee, whose employment is in commerce or affects commerce, required to attempt use of the contract grievance procedure agreed upon by employer and union as the mode of redress, where, as here, his grievance arises from a right given the employee simply by that contract (a right to work-free mealtime) (and the breach of that right by the employer); or may the employee completely by-pass those grievance procedures and sue at once under Section 16 (b) of the Fair Labor Standards Act (FLSA), 29 U.S.C. 201-219 (which act makes no provision for work-free mealtime)?

3. Where, as here, the Collective Bargaining Agreement awards the employee a regular rate of pay and overtime pay (and many "fringe" benefits) materially better than the minimum requirements of FLSA, may the employee who shares the benefits of that contract reject the contract obligation of grievance procedure as his remedy and seek, instead, the generalized remedy of action under FLSA?

4. Whether to permit a choice of remedies, between arbitration or suit, would tend to frustrate or erode the policy of Congress and this Court to fashion a body of arbitration law in implementing national labor rela-

tions policy, where, as here, the claim is simply for contract overtime pay for the employer's failure to honor a contract agreement to allow a work-free meal period.

5. Whether the Supreme Court of Iowa, in Division II of its prevailing Opinion (we do not here challenge its Division I), erred in sustaining the Ruling of the Trial Court rejecting petitioner's motion to require utilizing the contract grievance procedures.

STATEMENT OF THE CASE

The 14 plaintiffs (respondents here), each for himself, brought 14 separate actions, by the same law firm, in the District Court of Crawford County, Iowa, against petitioner, claiming overtime pay, liquidated damages, attorney fees and costs under the Fair Labor Standards Act. The case was tried by ordinary proceedings without a jury. Not until the trial were the 14 cases consolidated; they were also consolidated for appeal to the Supreme Court of Iowa (Iowa's highest court) (Appendix, A.11.).

All respondents were employed by petitioner in employment in interstate commerce or affecting commerce. Petitioner is engaged in the processing of meat and its distribution and sale throughout the United States. All respondents were employed in the maintenance department, their duties being chiefly to maintain and repair plant machinery and equipment used by petitioner in the processing of meat.

Respondents' employment was governed by the Collective Bargaining Agreement effective from and after February 12, 1965, made between petitioner and Associated Employees Organization ("the Union"). In that contract, Article XIV provides for a "lunch

period" (Appendix, A.29.); it is agreed that the period was to be of 30 minutes' duration.

The respondents, in their action at law, asserted that during the period of two years preceding the filing of their actions (13 filed on April 21, 1967, and one on Dec. 12, 1967) they were, in effect, denied their contract right of a 30-minute work-free meal period, in that they were required to be "on call" during their lunch period, each work day. Accordingly, each claimed to be entitled to pay at the contract overtime rate for each such half-hour during the period of two years. The Trial Court found these facts in favor of respondents (Appendix, A.9); these findings were affirmed by Division I of the prevailing Opinion of the Supreme Court of Iowa (Appendix, A.15); while petitioner does not concur in the correctness of those findings, we do not here challenge them.

However, petitioner did challenge, by Answer (A.4) and by Motion (A.6) in each of the 14 cases (both in the Trial Court and in the Supreme Court of Iowa), all of the actions as premature because all respondents (by their own admission) *failed to attempt to exercise the grievance procedures contracted for in the Collective Bargaining Agreement.* The Trial Court overruled petitioner's Motion (Appendix, A.7); the Supreme Court of Iowa, in Division II of its prevailing Opinion, affirmed (Appendix, A.17); hence the Petition for a Writ of Certiorari.

The Collective Bargaining Agreement in its Article III (Appendix, A.28) states the "intent and purpose of the parties" to be to "promote and improve the industrial and economic relationships between the Company, the Union and its members . . ."

Article VII of that Agreement (Appendix, A.29) deals with "Hours of Work" and provides for time and one-half (1½) to be paid for hours worked in excess of 8 in any day (and in excess of 40 hours in any one week).

Article XX—"Grievance Procedure" (Appendix, A.29) provides for "the Union or any individual employee" a grievance procedure in 3 steps, concluding with binding arbitration provisions.

Respondents' substantive claims rest solely and simply on the contract provision for work-free meal-time and the petitioner's alleged breach of that commitment. The Fair Labor Standards Act contains no provision for meal-time. Respondents have availed themselves of all the benefits of the Collective Bargaining Agreement (benefits that are materially greater than those required by FLSA); but, admittedly, respondents *refused to fulfill their contract obligation to attempt grievance procedures and arbitration as their remedy.*

SUMMARY OF THE ARGUMENT

An employee who asserts a substantive right arising from a Collective Bargaining Agreement must, for remedy, *attempt* to utilize the grievance and arbitration provision of that Agreement. Here, by their own admission, the employees made no such attempt. They may not proceed directly to court action under the Fair Labor Standards Act.

The central issue is that there be no reversal, frustration, or erosion of the Congressional policy declared in the 1947 LMRA and the endeavors of this

Court seeking to formulate harmonious procedures in a national labor relations policy.

Our view is supported by:

(a) Congressional policy declared in the Labor-Management Relations Act, 1947;

(b) The decisions of this Court in a national labor relations policy, with special reference to *Republic Steel Corporation* v. *Maddox,* (1965), 379 U.S. 650.

(c) Four decisions of United States Courts of Appeals in Fair Labor Standards Act cases (cited hereinafter).

(d) The dissenting opinion of the Supreme Court of Iowa in the present case; and

(e) The dissenting opinion in *U.S. Bulk Carriers, Inc.* v. *Arguelles,* (1971), 400 U.S. 351.

Nor do the prevailing opinions in *Arguelles* and in this case stand in the way. The Iowa majority rests almost wholly on *Arguelles. Arguelles* is distinguishable on the facts and on the law. Here, the substantive right arose simply from the contract (as in *Maddox*); in *Arguelles,* the right arose solely from the statute. Here, the FLSA is a broadly generalized statute; in *Arguelles,* the statute is exceptional and distinctly specialized and restricted, to protect the traditional national policy, centuries old, shielding wards of the Admiralty.

These considerations become especially persuasive in view of the nature of the right asserted by re-

spondents. That right is for a work-free (not subject to call) lunch period; that right is granted by the Collective Bargaining Agreement; the statute (FLSA) makes no provision for a work-free lunch-time.

Maddox, not *Arguelles,* applies here.

ARGUMENT

POINT I

The Crucial Issue Is That There Be No Reversal, Frustration, or Erosion of the Congressional Policy Declared in the 1947 LMRA and the Endeavors of This Court Seeking To Formulate Harmonious Procedures in a National Labor Relations Policy.

Congress has expressly approved contract grievance procedures as "the desirable method" for settling disputes in labor relations. LMRA Section 203 (d), 29 U.S.C. Section 173 (d) (1947) (set out as Supplement A at the end of this brief).

In 1957, this Court, in *Textile Workers Union* v. *Lincoln Mills,* 353 U.S. 448, concluded to compel arbitration (requested by the union and refused by the employer). In an opinion by Mr. Justice Douglas, this Court (with only Mr. Justice Frankfurter dissenting) adopted Section 301 of the Labor Management Relations Act of 1947, 61 Stat. 156, 29 U.S.C. Section 185, as a charter authorizing "federal courts to fashion a body of federal law for the enforcement of these collective bargaining agreements and includes within that federal law specific performance of promises to arbitrate grievances under collective bargaining agreements." (p. 451). Furthermore, this Court ruled: "The congressional policy in favor of the enforcement of agreements to arbitrate grievance disputes being clear, there is no reason to submit them

to the requirements of Section 7 of the Norris-LaGuardia Act. (pp. 458-459).

Lincoln Mills was a suit by a union; the opinion reserved the question of the rights of individual employees. That question was resolved in *Republic Steel Corporation* v. *Maddox* (1965), 379 U.S. 650, which we believe controls our case. This Court reversed a money judgment awarded Maddox by the State courts. Maddox claimed severance pay under a collective bargaining agreement. That agreement, as here, contained a three-step grievance procedure, to be followed by binding arbitration; Maddox made no effort to utilize that mode of redress. In an opinion by Mr. Justice Harlan (with only Mr. Justice Black dissenting), this Court said:

> "As a general rule in cases to which federal law applies, federal labor policy requires that individual employees wishing to assert contract grievances must *attempt* use of the contract grievance procedure agreed upon by employer and union as the mode of redress." (Emphasis in original) (p. 652).

And, at page 657:

> "Comprehensiveness is inherent in the process by which the law is to be formulated under the mandate of Lincoln Mills," and "the subject matter of section 301 (a) 'is peculiarly one that calls for uniform law.'" Local 174, Teamsters etc. v. Lucas Flour Co., 369 U.S., at 103.

In our case, the respondents admit that they did not attempt to utilize the contract grievance procedures.

In the development of a national labor relations policy, the principles of *Lincoln Mills* and of *Maddox*

have been implemented in many decisions of this Court.[1] The sole exception (based on its special facts and its special statute) appears to be *U. S. Bulk Carriers* v. *Arguelles*, (1971), 400 U.S. 351, to be discussed *infra*.

POINT II

The Rule of Maddox, Not the Rule of Arguelles, Applies Here, Thus Requiring the Respondents To Attempt To Utilize the Grievance and Arbitration Provisions of Their Collective Bargaining Agreement, Rather Than Proceeding Directly to Court Action Under the Fair Labor Standards Act.

As stated in our Summary, supra, the right asserted by respondents is a work-free lunch-time; that right is granted by the Collective Bargaining Agreement; the statute (FLSA) makes no provision for a work-free lunch-time.

The prevailing Opinion below (it states "the question is close") accords priority to court action under

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[1] See the *Steelworkers* trilogy, (1960), 363 U.S. 564, 363 U.S. 574, and 363 U.S. 593; *John Wiley & Sons, Inc.* v. *Livingston*, (1964), 376 U.S. 556-559; *Vaca* v. *Sipes*, (1967), 386 U.S. 171; *The Boys Markets, Inc.* v. *Retail Clerks' Union*, (1970), 398 U.S. 235. Note also *Bivens* v. *Six Unknown Agents*, (June 21, 1971), — U.S. —, 29 L. Ed. 2d. 619 at 631 (citing the Lincoln Mills principle in a federal narcotics unlawful search case); and *Amalgamated Association* v. *Lockridge*, (June 14, 1971), — U.S. —, 29 L. Ed. 2d. 473 at 484, (ruling that the employee's claim against his union should have been directed to the National Labor Relations Board, not to the State court). Significant, too, is the decision of NLRB in *Collyer* v. *Local Union*, (August 20, 1971), 192 NLRB No. 150, Case No. 1-CA-6916, 1971 CCH NLRB Decisions, Para. #23,385 (deferring Board jurisdiction in favor of the arbitration provision, for an alleged violation of Section 8 (a) (5), expressly implementing this Court's "national policy" under Section 301 of the LMRA, citing the *Steelworkers* trilogy, *supra*, *Lincoln Mills*, and *Boys Markets*).

the Fair Labor Standards Act as against grievance procedure and arbitration. In doing so, that Opinion rests largely, if not wholly, on the prevailing Opinion of this Court in *U. S. Bulk Carriers, Inc.* v. *Arguelles*, 400 U.S. 351, 27 L. Ed. 2d 456, 91 S. Ct. 409, decided January 13, 1971. With all deference to the Iowa Opinion, we believe that *Arguelles* does not warrant the Iowa conclusion in our case; with all respect, we believe the Iowa prevailing Opinion reads *Arguelles* erroneously or applies it erroneously.

Opposed to that Iowa Opinion are these: Four decisions of United States Courts of Appeals, cited in the Iowa opinion itself, ruling "In accordance with this general rule," . . . "that employees must attempt to arbitrate FLSA claims before they can come to court."; the Iowa dissenting Opinion in our case, discussing, inter alia, the same four Courts of Appeal decisions; the dissenting Opinion in *Arguelles* in this Court; and we believe the considerations stated by Mr. Justice Harlan in his concurring opinion in *Arguelles* may tend to support our view in favor of requiring that utilization of grievance procedures should apply in our case. We shall return to these later, herein.

Arguelles Distinguished:

We begin by indicating material differences in the facts and in the law, distinguishing *Arguelles*. The substantive claims of respondents here rest entirely and simply on the Collective Bargaining Agreement. That contract, Article XIV (Appendix A.29) (*not* FLSA) commits the Company to allow its employees one-half hour of work-free meal time; for any breach of that obligation, the company (petitioner) must pay as for time worked, at the overtime rates stipulated in

the contract; and those rates are materially higher than the FLSA minimum provisions. By contrast, in *Arguelles, his* Brief (page 15) asserted that "the wellspring of his right is not the collective bargaining agreement, but the text of the statutes and the court's interpretation of them." Here, the Iowa prevailing opinion itself recites: "Under the contract between the union and defendant, the men were supposed to have a thirty-minute lunch period." (Appendix, A.14, third paragraph).

On the law side, there is sharp distinction, too. In *Arguelles,* the statute imposed the civil penalty, irrespective of any improper shortage, as a weapon to enforce prompt payment of seamen's wages; the statute was traced as far back as 1790; it evidenced the continuing traditional policy of our government in solicitude for the protection of seamen as wards of admiralty; it singled out a special sub-class of employees for special and different treatment. All this is stressed throughout the briefs and prevailing opinion in this Court. And the statute in *Arguelles* makes no provision for administrative enforcement.

Not so, the FLSA; the FLSA is written in broad, generalized strokes, suited to a wide variety of circumstances and of needs; like the LMRA, the FLSA is open to all employees engaged in commerce or in activities affecting commerce; it is one of a set of Acts serving to formulate national labor policy, all of relatively recent vintage; indeed, FLSA was enacted a decade later than the United States Arbitration Act of 1925. Moreover, FLSA contains so many administrative provisions and such extensive authority to the Wage and Hour Administrator for court actions, including injunctive relief, that there is need in FLSA

to make clear that action in court is available to the individual employee who is not shielded by a Collective Bargaining Agreement and a Union.

Indeed, in the typical FLSA case, there is no substantive contract right; there is no breach; the wrong consists of violation of the statute; there could be no remedy if the statute did not provide a remedy by administrative enforcement or by action in court. Actually, the administrative procedures are so efficient that only a minor fraction of cases get into the court.

Grievance Procedures a Better Remedy:

The case at bar demonstrates rather neatly that, given a Collective Bargaining Agreement, the grievance procedures and arbitration provide a remedy superior to individual action in court. Here we have 14 respondents, with 14 separate lawsuits (apparently so deemed advantageous by the one firm of lawyers who acted for all fourteen), with 14 separate sets of pleadings and motions, finally consolidated for trial and appeal. A single, simple grievance claim under the Agreement would have sufficed. It is interesting to note that the court did not award "liquidated damages" to any of the claimants. Except for the issue as to failure to attempt grievance procedures, all the questions in the 14 cases were purely factual, singularly suited to arbitration by persons well versed in the industry: (a) Were the employees subject to call during their supposedly work-free meal-time? (b) How much is due each? Also, implicit in all four United States Courts of Appeals FLSA cases cited in both of the opinions of the Supreme Court of Iowa, is the point that the arbitrators can and will apply the

relief provisions of FLSA; and in *Evans* v. *Hudson Coal Co.* (1948), CA-3, 165 F. 2d 970, the court is explicit: "But if the arbitration process proceeds to an award which is not in accordance with the provisions of the Fair Labor Standards Act or any other applicable statute, Sections 10 and 11 of the Arbitration Act provide means for its vacation, rehearing, modification or correction."

NLRB in its footnote 17 in its *Collyer* case cited in our footnote 1, states: (17) "As Member Jenkins points out, the arbitral process, like any other, is not without its imperfections. But the fact that some 95 percent of collective agreements currently look to arbitration as the means of resolving disputes which the parties are unable to resolve in the course of their grievance discussions, demonstrates both the accuracy of the Supreme Court's characterization and the continuing vitality of arbitration. Its successes suggest that we are here respecting substance and not mere 'mystique.'"

It may not be amiss to observe here that, unlike so many court cases under FLSA, petitioner was not charged with substandard wage rates, either as regular rates of pay or as overtime, wrongs which FLSA is especially designed to remedy. Quite the contrary: under the Collective Bargaining Agreement the respondents enjoy rates of pay, both regular and overtime, at substantially twice the level commanded by FLSA (to say nothing of such significant "fringe" benefits as profit-sharing, a guarantee of 40 hours of pay each week, vacation pay, rest periods on company time, insurance benefits at no cost to employees, etc.). Enjoying these superior advantages all derived from

the Collective Bargaining Agreement, the respondents admittedly elected to refuse to respect their obligations for grievance procedure and arbitration under that Agreement.

Discussion of the Iowa Opinions:

The prevailing Iowa opinion states (Appendix A.18, last paragraph): "The Fair Labor Standards Act too antedates the Labor Management Relations Act." Literally, that may be a correct statement. However, the United States Arbitration Act dates from 1925; in 1947 Section 301 of LMRA brought the arbitration policy to the forefront, since which time (20 years before the cases at bar were begun), FLSA and LMRA have marched hand in hand in American labor policy. Also, even before 1947 the 1925 Arbitration Act was held to be applicable to FLSA cases: *Donahue* v. *Susquehanna Collieries Co.*, (1942) CA-3, 138 F.2d 3 and *Watkins* v. *Hudson Coal Co.*, (1945) CA-3, 151 F.2d 311.

The dissenting Opinion of the Supreme Court of Iowa is, we believe, a persuasive brief for petitioner's position; we are happy to be privileged to present it to this Court. May we, with complete respect, point to three places in that minority Opinion where, we believe, our view and the view of the dissenting Justices are set forth with somewhat less definiteness than they merit? In all three instances the portions that we shall quote might be read as recognizing that the substantive rights claimed by the respondents derive from statute; the correct view, we are convinced, is that their substantive rights flow simply from the Collective Bargaining Agreement. The sentences here concerned are these: (Appendix A.21): "Plaintiffs do not

quarrel with these general rules but claim that as their rights arise out of a federal statute rather than out of the collective bargaining contract they have the right to elect whether to file suit or follow the grievance procedures in the agreement." (Appendix A.25): "These considerations are just as strong under a claim for overtime wages under the FLSA as they would be under a contract provision." (Appendix A.25): "Any distinction between the instant case and *Republic Steel Corporation* v. *Maddox* must be based on the fact that plaintiffs' rights here are based on statute (FLSA) and plaintiff's rights in *Maddox* were based on the contract." The sentences we have quoted were probably written in terms of remedial rights rather than in terms of substantive rights; so viewed, there is no confusion, and our case is the stronger. The substantive rights here are derived solely from the contract.

Discussion of the Cases:

To avoid burdening this Court with repeated citations and quotations, may we indicate briefly that the applicable underlying points and case citations supporting petitioner's views are set forth in the four opening paragraphs of Division II of the prevailing Opinion of the Iowa court (Appendix A.17) (but the majority "are inclined to think" "that the United States Supreme Court will apply *Arguelles* to FLSA cases" "although the question is close.") (Appendix A.18); and they appear at considerable length, with quotations, in the *dissenting* Opinion in Iowa (Appendix A.20-A.28); and in the dissenting Opinion of this Court in *Arguelles*. We respectfully incorporate those as part of petitioner's argument, and limit our discussion to the following:

Republic Steel Corporation v. *Maddox* (1965), 379 U.S. 650, 85 S. Ct. 614, 13 L. Ed. 2d 580, was an action brought in a *State* court in Alabama for severance pay under a collective bargaining agreement. *Maddox* made no effort to utilize the grievance and arbitration procedures. Instead, he sued for breach of contract. The trial court awarded him a money judgment; two higher State courts of Alabama affirmed. This Court reversed. In an opinion by Mr. Justice Harlan, writing for eight members of the Court, this Court ruled that the general federal rule applies, that the employee must attempt use of the contract grievance procedure. We respectfully submit that *Maddox* (not *Arguelles*), rules our case.

In *Arguelles,* Mr. Justice White, writing for four members of the Court, stated (p. 473 of 27 L. Ed. 2d) that all issues in that case (including the question of the statutory penalty) were suitable for arbitration. And, on the same page, he noted that "circuit courts of appeal both before and after passage of Section 301 have required that FLSA employee's claims for liquidated damages under 29 USC Section 216 (b) for failure to pay overtime wages be referred to contractual procedures before being presented to the court."

POINT III

Meal-Time Is Strictly and Simply a Contract Right; Nothing in the Fair Labor Standards Act Requires an Employer Commitment To Work-Free Lunch-Time.

Given the employer-employee relationship, there is nothing in the FLSA that requires an employer commitment to work-free lunch-time. Where an employer makes such a committment by contract, he must, of course, bear the consequences of a breach. In this, the FLSA is quite unlike the statute in *Arguelles;* there

the statute granted (to a special group as "wards of the Admiralty") both the right and the remedy. The FLSA remedy may (not must) include liquidated damages and attorney fees, enforceable, as we have noted, by arbitration.[2]

POINT IV

Four United States Courts of Appeals Decisions in Fair Labor Standards Act Cases (Before and After LMRA Section 301) Require That Attempt Be Made To Utilize the Grievance and Arbitration Provisions.

Arbitration Provisions

We find four such FLSA cases: *Donahue* v. *Susquehanna Collieries Company* (CA 3) (1943) 138 F.2d 3 (claim for overtime wages); *Watkins* v. *Hudson Coal Company* (CA 3) (1945), 151 F.2d 311 (cert. denied 1946, 327 U.S. 777 and 816) (claim for overtime wages, liquidated damages, attorneys' fees and costs) (in that case the opinion states "A brief has also been filed for the Administrator of the Wage and Hour Division, United States Department of Labor"); *Evans* v. *Hudson Coal Company* (CA 3) (1948), 165 F.2d 970 (claim for regular and overtime pay, liquidated damages, fees and costs); and *Beckley* v. *Teyssier* (CA 9) (1964), 332 F.2d 495 (claim for overtime pay for time in travelling between job sites, and liquidated damages, fees, and costs). We may observe, in passing, that *Gatliff Coal Co.* v. *Cox* (CA 6) (1944), 142 F.2d 876

[2] While irrelevant to the legal question here at issue, it is interesting to note that the judgment rendered below awards a windfall to these employees, that is, pay at the rate of time and one-half for eating their meals; actually, in addition, they did get their time out to eat. (R. 12, 18, 19, 20, 22). There were some rare exceptions (R. 24); in one instance, the Union presented a grievance on the point; the result was that "the company paid the people." (R. 26).

is no longer to the contrary, having been decided three years before the 1947 LMRA.

(The United States Arbitration Act of 1925, referred to in those four decisions, and printed as Supplement B at the end of this brief, evidences Congressional interest in arbitration 13 years before the Fair Labor Standards Act of 1938.)

As noted above, Mr. Justice White's dissenting opinion in *Arguelles* refers to the foregoing cases with approval, as being within the rule of *Maddox.*

And the dissenting opinion by the Supreme Court of Iowa contains a rather complete discussion of these FLSA cases, including extensive quotations from some of the opinions. (A. 21-A. 23). We respectfully refer thereto; we refrain from repetition here.

POINT V

The Rights of Employees To Bring Action in Court Are Rigidly Qualified by the Fair Labor Standards Act and Are Seriously Restricted in Practice.

Mr. Justice Harlan wrote the opinion for the Court in *Maddox;* also, he wrote a separate concurring opinion in *Arguelles.* In *Arguelles,* he strongly reaffirmed the *Maddox* principle; he concurred in *Arguelles* solely because the severely specialized seaman's statute in *Arguelles* was the source of the seaman's *substantive* rights; and so he urged the need for close study of the statute before decision. That last may be wholly irrelevant here, because here the *substantive* rights of these respondents come solely from the Collective Bargaining Agreement not from the statute; nevertheless, it may be appropriate to examine the FLSA more fully than we have done thus far in this brief.

The Fair Labor Standards Act of 1938, as amended (29 U.S.C. 201-219) is a broadly generalized act; yet it rigidly restricts the rights of employees thereunder.

The declared policy of the Congress (Section 2(a)) is directed to "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency and general well-being of workers . . ."

Originally, in 1938, the protected minimum regular rate of pay was only 25 cents per hour. Since 1966 it is $1.60 per hour. In 1965, when the Collective Bargaining Agreement was made, the statutory rate was $1.25 per hour; the rates for these employees, under their contract, ranged from $2.61 per hour to $2.96 per hour (increased in 1967 to yet higher rates). (With time and one-half, in each case, for all hours beyond 40 hours in any work-week).

Section 13 of the Act lists 37 exemptions (and many others are found in Section 7).

Section 16 (a) provides for criminal actions for violations.

Section 17 provides for injunction proceedings to restrain violations.

In addition (and further unlike the statute in *Arguelles*), the Act invests the Secretary of Labor with broad administrative powers for enforcement:

Section 16 (c) provides for Wage Collections by Government, by informal administrative procedures or by action in court by the Secretary. (In such case, no liquidated damages or attorney fees are allowed.)

Section 16 (b) (printed as Supplement C at the end of this brief) provides for Wage Suits by Employees. Action *may* (not must) be maintained in any court of competent jurisdiction. A 1961 Amendment requires that that right of employees "shall terminate upon the filing of a complaint by the Secretary of Labor in an action under Section 17 . . ."

In view of the foregoing, it is not surprising that "Very few of these suits have been brought by employees under section 16(b) of the act and of the few that have been brought most are initiated by individuals no longer in the employ of the defendant employer." (quoted in note 4, page 7, in Respondents' "Opposition to Petition for a Writ."). Clearly, FLSA is not designed to meet all wage controversies.

As long ago as 1942, this Court may have foreclosed the issue against the respondents. Dealing with a *wage contract* which the then federal Wage and Hour Administrator (Walling) claimed to be in violation of the 1938 FLSA, this Court rejected the argument. *Walling* v. *A. H. Belo Corporation,* (1942), 316 U.S. 624. At page 635 this Court said:

> "Where the question is as close as this one, it is well to follow the Congressional lead and to afford the *fullest possible scope to agreements* among the individuals who are actually affected." (Our emphasis).

If our case be close (we venture to believe, as does the dissenting opinion in the Supreme Court of Iowa, that it is not close), it is significant to note this priority granted to contracts by this Court under FLSA, five

years before the additional Congressional mandate of the 1947 LMRA came upon the scene.[8]

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgments of the Courts below be reversed.

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[8] In *Brooklyn Savings Bank* v. *O'Neill*, 324 U.S. 697 (1946), this Court said that the legislative history of FLSA "shows an intent on the part of Congress to protect certain groups of the population from sub-standard wages * * * due to the unequal bargaining power as between employer and employee . . ."; so, too, in *D. A. Schulte, Inc.* v. *Gangi*, 328 U.S. 108 (1946).

Moreover, except for the small minimum wage guaranteed, the courts recognize that FLSA actions are actions on contract. *Republic Pictures Corp.* v. *Kappler* (cited by Respondents, Brief p. 11), 151 F.2d 543, aff'd per curiam 327 U.S. 757 (1946) states:

> The action for overtime under the statute is an action on contract; at least, the Federal statute is bottomed upon a contract of employment. As said in *Northwestern Yeast Co.* v. *Broutin*, 6 Cir., 133 F.2d 628, "The Federal statute is premised upon the existence of an employment contract * * * The action for double compensation may be considered as debt or as an action for wages due under the employment agreement."

SUPPLEMENT A

Labor-Management Relations Act

June 23, 1947, c. 120, Title II, Section 203, 61 Stat. 153, 29 U.S.C. Section 173 (d).

(d) Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement. The Service is directed to make its conciliation and mediation services available in the settlement of such grievance disputes only as a last resort and in exceptionol cases. June 23, 1947, c. 120, Title II, § 203, 61 Stat. 153.

June 23, 1947, c. 120, Title III, Section 301, 61 Stat. 156, 29 U.S.C. Section 185 (a) et seq.

§ 185. Suits by and Against Labor Organizations—Venue, Amount, and Citizenship

(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

SUPPLEMENT B

United States Arbitration Act

Act of Feb. 12, 1925, c. 213, Section 3, 43 Stat. 883, codified July 30, 1947, c. 392, 61 Stat. 670, 9 U.S.C. Section 3.

§ 3. Stay of Proceedings Where Issue Therein Referable to Arbitration

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied

that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

July 30, 1947, c. 392, 61 Stat. 670.

SUPPLEMENT C

Fair Labor Standards Act

29 U.S.C. Sec. 216, Section 16 (b) of the Act as amended.

(b) Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action. The right provided by this subsection to bring an action by or on behalf of any employee, and the right of any employee to become a party plaintiff to any such action, shall terminate upon the filing of a complaint by the Secretary of Labor in an action under section 217 of this title in which restraint is sought of any further delay in the payment of unpaid minimum wages, or the amount of unpaid overtime compensation, as the case may be, owing to such employee under section 206 or section 207 of this title by an employer liable therefor under the provisions of this subsection.